

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 99-214
Table of Allotments,) RM-9546
FM Broadcast Stations.)
(Camp Wood, Texas))

To: The Chief, Allocations Branch

MOTION TO STRIKE

La Radio Cristiana Network, Inc. ("LRCN"), by its attorneys, hereby moves to strike two pleadings in the captioned proceeding.¹ Frank McCoy, who filed a counterproposal, has filed two unauthorized pleadings styled "Reply Comments on Counterproposal" ("Reply Comments") and "Response of Frank McCoy" ("Response"). In these pleadings, McCoy has included extraneous material that was not raised by the petition for rulemaking submitted by LRCN, the public notice, the Counterproposal of McCoy, or any other timely comments.

I. The Reply Comments Should be Stricken.

McCoy's Reply Comments reiterate the supposed superiority of an allotment at Rocksprings, Texas, on Channel 251C2, as compared to the proposed allotment on Channel 251C3 at Camp Wood. These allotments are mutually exclusive. McCoy also reiterates his interest in building a station to operate on Channel 251C2 at Rocksprings.

¹ LRCN hereby requests leave to file the instant motion.

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Section 1.52 of the Commission's Rules requires that pleadings not signed by counsel for a party be verified. The Reply Comments, like the Counterproposal, were neither verified nor signed by counsel. The Reply Comments should be stricken in their entirety for this reason. A detailed analysis of the Commission precedent for striking such unverified pleadings is contained in LRCN's Reply to Counterproposal, filed on August 26, 1999. LRCN's Reply is incorporated herein by this reference.

In addition to the lack of verification, there is a further basis for striking a significant part of McCoy's Reply Comments. Except for McCoy's renewed expression of interest in a Rocksprings station, the Reply Comments consist of extraneous matter which should be stricken.²

Reply pleadings are to be limited to matters raised in the pleadings to which they are supposedly responsive.

The Commission has long held that a party may not introduce new issues in a reply. *See Central Florida Comm.*, 8 FCC Rcd 4128, n2 (Rev. Bd. 1993) The general policy against the introduction of new matter in reply pleadings finds expression not only in Commission case law but in several rule sections. (*See, e.g.*, §§ 76.7(c)(1), 76.1003(f), 1.726 & 68.410).

² McCoy's expression of continuing interest in the Rocksprings allotment would, if verified, have been permissible at the reply comment stage, however dubious such an expression may be. LRCN, in its Reply to Counterproposal, has discussed the unreliability of McCoy's stated commitment to build a station at Rocksprings.

In the instant case, the Reply Comments suggest an alternative modification of the LRCN construction permit. In addition, in a footnote McCoy alleges that LRCN did not have reasonable assurance of the availability of space on the tower proposed in the LRCN application.

It is improper to raise such issues at the reply comment stage, as McCoy has done. Rather, any protest related to the availability of the antenna site should have been raised before the cut-off date for petitions to deny the application of LRCN for the original construction permit for the Camp Wood station.

Conceivably, the Commission might hesitate in striking McCoy's belated objection if there were any substance to the new matter contained in the Reply Comments. However, they are devoid of merit. LRCN has, in fact, had reasonable assurance of availability of space on its proposed tower at all times since the submission of its application for the Camp Wood construction permit. McCoy has presented data concerning a different tower from that specified in the LRCN permit. The tower specified in the construction permit of LRCN is 68 meters in height, at geographical coordinates 29° 42' 53"N 100° 0' 56"W. It is owned by Southwest Texas Telephone, and bears tower registration number 1049361.

In contrast, McCoy's reply was supported by an affidavit from two employees of the owner of a nearby tower. That tower has a height of 92.3 meters, at geographic coordinates 29° 42' 52"N 100° 0' 56"W. It bears tower registration number 1033072.

In other words, of the two electronic communications towers in Camp Wood, LRCN's application specified the northern tower. The affidavit McCoy provided relates to the southern tower.

McCoy's confusion in this regard is excusable because it appears to stem from an error on the part of LRCN's consulting engineer. This consulting engineer contacted representatives of both tower owners when LRCN was seeking an antenna site for the station. Representatives of the northern tower granted assurance of tower availability, and that tower was specified in the engineering portion of the application. Because of inadvertence on the part of LRCN's consulting engineer, however, the person listed as the source of LRCN's site certification was an employee of the owner of the southern tower.

In consideration of the foregoing, the Reply Comments should be stricken.

II. McCoy's Response is Improper.

Likewise, McCoy's "Response" should be stricken. It is an unauthorized pleading, and there is no provision in the Commission's Rules for the submission of such a Response. In addition, the Response adds nothing of decisional significance to the record. McCoy, in an attempt to remedy his violation of the Rules, points to precedent that ostensibly excuses his failure to verify his counterproposal. Notwithstanding McCoy's contentions, the cases cited by McCoy in support of his position fall short of waiving the verification requirement. Only one of these cases arguably provides an example of acceptance by the Bureau of an unverified counterproposal in an allotment proceeding. That is *Ider, Alabama*, 10 FCC Rcd

10799, at fn. 3 (M.M. Bur. 1995). However, in that instance, the counterproposal was technically deficient and therefore was not placed on public notice. Thus, the holding of *Ider* cannot be said to turn on the verification issue. Accordingly, comments on verification in the footnote must be viewed as dictum. Its precedential value is negligible.

Moreover, in *Ider* the Bureau took pains to point out that it could not waive the verification requirement. *Id.*, citing *Belo Broadcasting Corp.*, 39 R.R. 2d 899, 901 n.4 (A.L.J. 1977). Rather, the Bureau merely noted that it may accept a late-filed cure of the failure to provide verification, citing *Canton, Illinois*, 3 FCC Rcd 5824 (M.M. Bur. 1988). At the same time, grant of such waivers on a routine basis runs counter to the verification requirement of the Rules. It is altogether appropriate that the Bureau's use of this procedure has been rare. Its use should remain limited to only the rarest occasions in which the most compelling public interest considerations are manifest.

Of course, the full Commission has the authority to waive any requirement for good cause shown. *Knox Broadcasting, Inc.*, 12 FCC Rcd 3337 (1997). However, as interpreted by the Courts, waiver requires that a petitioner demonstrate that special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest better than adherence to the general rule. *ALLTEL Corp.*, FCC 99-156 (September 3, 1999), citing *Northeast Cellular Telephone Co. v. FCC*, 877 F.2d 1164 (DC Cir. 1990). The *Knox* decision demonstrates how rarely the Commission exercises this power. The allotment case cited in *Knox* [*Lake City, South Carolina*, 47 FCC 2d 1067, 1069 (1974)] as

support for the Commission's authority to waive the verification requirement was decided a quarter-century ago. Since the *Knox* decision was not an allotment case, there is no indication that the modern Commission would choose to waive the verification requirement in the context of an allotment proceeding. Furthermore, even if the Commission has, in one instance, waived the requirement for verification, it is far from clear that the Commission has delegated to the Bureau the authority to waive the verification requirement in an allotment proceeding. In this regard, we note that in *Knox* the Commission was not dealing with the longstanding requirement that counterproposals be complete and correct as of the deadline for the submission of comments. Indeed, if FCC rules and precedent are to hold any meaning and are to provide any substantial guidance whatsoever, waiver of the verification requirement based on the acceptance of a late-filed cure should be seen as rare exceptions, prompted only by the strongest of public interest concerns and exercised only as a last resort by the full Commission. This requirement for a waiver has not been met by McCoy.

III. LRCN Has Not Conceded That the McCoy Plan is Preferential.

The Response speciously claims that LRCN somehow has accepted McCoy's premise that his counterproposal includes a preferential arrangement of FM allotments. To the extent that this frivolous premise merits a response at all, the Bureau's attention is drawn to LRCN's Reply to Counterproposal. There LRCN pointed out that an allotment of an alternate channel is available to Rocksprings, as a means of satisfying McCoy's purported interest in building a station at Rocksprings. With an allotment of either Channel 295C2 or Channel

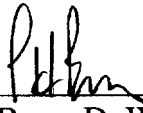
299C2 to Rocksprings, the mutual exclusivity between the proposal of LRCN and the Counterproposal of McCoy can be resolved, thus providing both a first local service to Rocksprings on either Channel 295C2 or Channel 299C2, and improved service to Camp Wood on Channel 251C3.

IV. Conclusion

In view of the above, LRCN respectfully requests that the Bureau (a) strike McCoy's Response in its entirety, and (b) strike such portions of McCoy's Reply Comments as constitute extraneous material not raised by the proposal of LRCN, the public notice in this matter, or the Counterproposal of McCoy.

Respectfully submitted,

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Dated: December 14, 1999

CERTIFICATE OF SERVICE

I, Kerstin Koops Budlong, hereby certify that on this date I caused the foregoing "Motion to Strike" to be served by U.S. first class mail, postage prepaid, on the following:

Frank McCoy
11508 Chancellroy Drive
Austin, Texas 78759


Kerstin Koops Budlong

Dated: December 14, 1999